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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 431

J. R. KEATON,

Appellant,

vs.

CITY OF OKLAHOMA CITY AND DAVON OIL COMPANY.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 431

APPEAL FROM THE SUPREME COURT OF OKLAHOMA, S. C. NO. 28924.

J. R. KEATON,

Appellant,

vs.

CITY OF OKLAHOMA CITY, A MUNICIPAL CORPORATION, AND DAVON OIL COMPANY, A CORPORATION, SUCCESSOR TO HARRELL-DAVIS OIL COMPANY,

Appellees.

RESPONSE TO JURISDICTIONAL STATEMENT AND MOTION TO DISMISS APPEAL.

Appellees, for response to jurisdictional statement filed herein, say:

That the Supreme Court of the United States is without jurisdiction or power to consider the proposed appeal for that:

I.

The proposed appeal purports to submit to the Supreme Court of the United States a re-examination and review of

an opinion by the Supreme Court of the State of Oklahoma, dated April 30, 1940, docketed under No. 28,924 in the said Supreme Court of Oklahoma, which appeal was a review of a judgment of the District Court of Oklahoma County, State of Oklahoma, dismissing appellant's petition after sustaining a general demurrer thereto. Said opinion appears in (Oklahoma Appellate Court Reporter, Vol. 95 at page 515), and in 102 Pac. (2d) at page 938, and reads as follows:

> "This is a suit for damages, for cancellation of oil lease and for injunction, by J. R. Keaton, plaintiff, against the City of Oklahoma City, a municipal corporation, and Davon Oil Company, a corporation, defendants.
>
> "The trial court sustained the separate general demurrer of both the defendant city and the defendant, Davon Oil Company. The plaintiff elected to stand upon his amended petition and the trial court dismissed plaintiff's amended petition and rendered judgment for the defendants.
>
> "The plaintiff, Keaton, owned lots adjoining a tract owned by the city and designated as Riverside Park. In 1933 an ordinance of the city extended an oil drilling zone to include plaintiff's property and Riverside Park. Thereafter the city leased the park tract for oil development, and the lessee or assignee obtained proper permit to drill, as required by law, and immediately drilled wells on the park tract to production. Such wells had produced oil for some years, or at least more than one year before this suit was filed. The plaintiff sought in a former action to prevent the execution of the oil lease and the granting of the permit to drill, but such effort did not succeed. See Oklahoma City v. Keaton, 178 Okl. 294, 62 P. 2d 981.
>
> "The plaintiff by this action seeks to cancel the lease and to restrain further production from the oil wells and to recover damages. He avers damage to his property on account of the proximity thereto of the oil wells which produce bothersome odors and noises and

increase fire hazards, and as his chief attack, questions the authority of the city to pass the zoning and authorizing ordinances and the validity thereof. The zoning ordinance here involved is the same ordinance No. 4475 mentioned in Oklahoma City *v.* Keaton, *supra,* and in Keaton *v.* Brown, 171 Okl. 38, 45 P. 2d 109. Any hazard of the oil wells will be assumed to be covered by proper bond. It is so required by law.

"The plaintiff here urges reversal on five grounds or propositions. The first three propositions were expressly presented and decided adversely in Keaton *v.* Brown, *supra,* Hubbard *v.* Oklahoma City, 177 Okl. 263, 58 P. 2d 547, and Beveridge *v.* Harper & Turner Oil Trust, 168 Okl. 609, 35 P. 2d 435, and in other cases referred to in the above-cited decisions. On account of the similarity of the questions here presented and the clarity of the above-cited decisions on each question, we deem it not necessary to here discuss these propositions further. We must take it as settled by our many former decisions that the city, by proper legislation, and by the legislation here attacked, may authorize and regulate the drilling for oil in the city limits.

"The plaintiff in his fourth proposition contends that the defendant, Oklahoma City, never acquired title in fee simple to any portion of the land included within the boundaries of said Riverside Park, hence had no legal authority to alienate same. But, even if it were conceded that the city acquired such title, still it had no legal authority to divert the use of any part thereof from park purposes to that of mining for the production of crude petroleum.

"The reservation of title complained of is, 'that no less than ten acres of said reservation shall be set apart and used by said city for the location of public buildings, and for a public park.'

"We are of the opinion that although the conveyance contains the above use provision, it does not restrict the use of the land to that sole purpose, as is here contended. In Phillips Gas & Oil Co. *v.* Lingenfelter, 262 Pa. 500, 105 A. 888, 5 A. L. R. 1495, the court said: 'The insertion in a deed of a parcel of land

to a school district upon which to erect a schoolhouse of the words "for school purposes only" does not restrict the title of the district or prevent its leasing the property for the production of oil and gas.'

"In Priddy *v.* School District No. 78, 92 Okl. 254, 219 P. 141, 143, 39 A. L. R. 1334, we had under consideration a deed made to the school district, which deed contained the following provision: 'As long as used for a schoolhouse site.' In after years the school site was leased for oil and gas purposes by the school board and after oil was discovered the owner of the reversionary interest brought suit to recover damages by reason of the production of oil upon said property. We held that the deed conveyed fee-simple title subject only to abandonment as a school site.

"The plaintiff contends in his fifth proposition that he has a valuable vested property right in said park in the nature of an easement, of which right and interest he has been deprived by the alleged wrongful acts of the defendants. This contention may be answered by referring to Reichelderfer *v.* Quinn, 287 U. S. 315, 53 S. Ct. 177, 77 L. Ed. 331, 83 A. L. R. 1429, which held that: 'Landowners derived no rights against government merely from dedication of nearby land as park; such dedication being declaration of public policy, which same or succeeding Congress might change by devoting land to other uses.'

"In the case of East Chicago Co. *v.* City of East Chicago, 171 Ind. 654, 87 N. E. 17, 18, the court said: 'Owners of private property in the vicinity of a public square, whose means of ingress and egress would not be destroyed or affected by a discontinuance of its use for public purposes, have no vested rights in its continued use as a public square, their losses being merely consequential and not direct, and its discontinuance would not be a taking of private property without compensation.'

"We find no error in the action of the trial court, and the judgment is affirmed.

"Bayless, C. J., and Osborn, Gibson, and Davison, JJ., concur."

II.

That Section 344, 28 U. S. C. A. (Judicial Code, section 237, amended) provides:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The proposed appeal does not come within the provisions of the above-quoted statute for the reason that no Federal question was properly presented to or urged in the Supreme Court of the State of Oklahoma.

As reflected by the assignments of error filed in the Supreme Court of the State of Oklahoma, and quoted in appellant's jurisdictional statement, a Federal question is not presented. A Federal question is incidentally mentioned in appellant's brief, but the same is not argued or urged.

This Court, in *Hiawassee River Power Co.* v. *Carolina-Tennessee Power Co.*, 252 U. S. 341, 40 Sup. Ct. Rep. 330, said:

> "If a general statement that the ruling of the state court was against the Fourteenth Amendment were a

sufficient specification of the claim of a right under the Constitution to give this Court jurisdiction (see Clarke *v.* McDade, 165 U. S. 168, 172, 17 Sup. Ct. 284, 41 L. Ed. 673; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 248, 22 Sup. Ct. 120, 46 L. Ed. 171; Marvin *v.* Trout, 199 U. S. 212, 217, 224, 26 Sup. Ct. 31, 50 L. Ed. 157), still the basis for a review by this Court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this Court and in the assignment of errors filed here. But obviously that was too late. Chicago, Indianapolis, etc., Ry. *v.* McGuire, 196 U. S. 128, 132, 25 Sup. Ct. 200, 49 L. Ed. 413. The omission to set it up properly in the Supreme Court of the state was not cured by the allowance of the writ of error by its Chief Justice. Appleby *v.* City of Buffalo, 221 U. S. 524, 529, 31 Sup. Ct. 699, 55 L. Ed. 838; Hulbert *v.* Chicago, 202 U. S. 275, 280, 26 Sup. Ct. 617, 50 L. Ed. 1026; Marvin *v.* Trout, 199 U. S. 212, 223, 26 Sup. Ct. 31, 50 L. Ed. 157."

III.

The proposed appeal does not come within the provisions of the above-quoted statute for the reason that the decision of the Federal question now raised was not determined by the Supreme Court of the State of Oklahoma, and was not necessary to the determination of the cause.

An examination of the above quoted opinion of the Supreme Court of the State of Oklahoma does not show a determination or a discussion of a Federal question. The Supreme Court of Oklahoma therein points out that appellant's first three propositions were expressly presented and decided in three previous opinions rendered by it. These

three propositions as reflected by appellant's brief are as follows:

> "Municipalities having no inherent authority to enact zoning ordinances, and the power to enact same having been conferred on 'the legislative bodies of cities' by Chap. 178, S. L. 1923 (Secs. 6170-6179, O. S. 1931) for the purpose 'of promoting health, safety, morals, or the general welfare of the community,' can such municipalities exercise this power for the mere purpose of securing financial gain to themselves and to certain private parties, without regard to the health, safety, morals, or general welfare of the community, or in contravention thereof?
>
> "After certain districts of a municipality have been properly zoned by a general zoning ordinance, for recognized municipal purposes (such as residential, apartment house, retail merchandise, and wholesale and industrial uses), and the lots and other parcels of land therein have been acquired and improved in reliance upon the classifications made by said ordinance, can the legislative body of such municipality pass a legal zoning ordinance changing said classifications so as to impose a much more burdensome, hazardous and damaging use upon any of said districts by amendment of such general ordinance or the adoption of a new one, where such district is still suitable for and being devoted to the use prescribed by said original general zoning ordinance?
>
> "Even if conceded to be valid, there can be no doubt but that Ordinance No. 4475 never became effective because of the referendum proceeding instituted against it."

Appellant's fourth and fifth propositions are then discussed by the Supreme Court of Oklahoma and decided upon the general law of said State without any reference to or discussion of a Federal question.

This Court, in *Honeyman* v. *Hanan*, 300 U. S. 14, 81 L. Ed. 476, said:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause. Lynch *v.* New York, 293 U. S. 52, 54, 79 L. Ed. 191, 192, 55 S. Ct. 16, and cases there cited. Whether these requirements have been met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the Federal Question was necessarily passed upon by the State court. That determination must rest upon an examination of the record. • • •
>
> "In Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169, this Court was asked to decide a question which was said to be presented under the contract clause with respect to the validity of a statute of Ohio. The Supreme Court of that State entered upon its record an elaborate certificate stating that the validity of the statute was drawn in question upon the ground that as applied to the charter of the plaintiffs in error it 'impaired the obligations thereof, and was repugnant to the Constitution of the United States, and that the decision of this court (the Ohio court) was in favor of the validity of the said act of the legislature as so applied.' Notwithstanding the certificate, the case was dismissed for want of jurisdiction. Id., p. 343. The court said:
>
> " 'It is not enough, that the record shows that "the plaintiff in error contended and claimed" that the judgment of the court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and "that this claim was overruled by the court;" but it must appear, by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to induce the judgment. Let us inquire, then, whether it ap-

pears on the face of this record, that the validity of a statute of Ohio, "on the ground of its repugnancy to the Constitution or laws of the United States," was drawn in question in this case,' Id., p. 341.

* * * * * * *

"The case of Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511, affords another illustration of the rule. The judgment was rendered in the Court of Appeals of New York and an entry was made in its record that on the argument of the appeal it was claimed by the appellant that the Act of Congress of (July 4) 1836, known as the Patent Act (5 Stat. at L. 117, chap. 357), governed the effect of the several transfers relating to the letters patent appearing in the case, and that the court had decided against the claims urged under that act. This Court observed that, until the certificate of the Court of Appeals, it nowhere appeared in the record that any question was raised as to the effect of the patent laws upon the title under consideration. And the court said (id. pp. 329, 330):

" 'We have often decided that it is not enough to give us jurisdiction over the judgments of the State courts for the record to show that a Federal question was argued or presented to that Court for decision. It must appear that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. Commercial Nat. Bank *v.* Buckingham, 5 How. 341, 12 L. Ed. 180; Lawler *v.* Walker, 14 How. 154, 14 L. Ed. 366; Mississippi & M. R. Co. *v.* Rock, 4 Wall. 180, 18 L. Ed. 382; Parmelee *v.* Lawrence, 11 Wall. 38, 20 L. Ed. 49.' "

This Court, in *Lynch et al.* v. *People of New York,* 293 U. S. 52, 55 Sup. Ct. Rep. 16, said:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest

court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. De Saussure *v.* Gaillard, 127 U. S. 216; 234, 8 S. Ct. 1053, 32 L. Ed. 125; Johnson *v.* Risk, 137 U. S. 300, 306, 307, 11 S. Ct. 111, 34 L. Ed. 683; Walter A. Wood Mowing & Reaping Machine Co. *v.* Skinner, 139 U. S. 293, 295, 297, 11 S. Ct. 528, 35 L. Ed. 193; Eustis *v.* Bolles, 150 U. S. 361, 366, 367, 14 S. Ct. 131, 37 L. Ed. 1111; Whitney *v.* California, 274 U. S. 357, 360, 361, 47 S. Ct. 641, 71 L. Ed. 1095; Mellon *v.* O'Neil, 275 U. S. 212, 214, 48 S. Ct. 62, 72 L. Ed. 245. Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. Allen *v.* Arguimbau, 198 U. S. 149, 154, 155, 25 S. Ct. 622, 49 L. Ed. 990; Johnson *v.* Risk, supra; Walter A. Wood Mowing & Reaping Machine Co. *v.* Skinner, supra; Consolidated Turnpike Co. *v.* Norfolk & Ocean View Railway Co., 228 U. S. 596, 599, 33 S. Ct. 605, 57 L. Ed. 982; Cuyahoga Power Co. *v.* Northern Realty Co., 244 U. S. 300, 302, 304, 37 S. Ct. 643, 61 L. Ed. 1153."

WHEREFORE, premises considered, appellees contend and most respectfully insist that the Supreme Court of the United States has no jurisdiction or power to inquire into the hypothetical questions and conclusions submitted by appellant herein, and for that reason submits the following:

Motion to Dismiss Appeal.

Appellees, and each of them, therefore respectfully move to dismiss the proposed and purported appeal herein for want of jurisdiction in the Supreme Court of the United States to consider the issues attempted to be raised and

presented by the proposed appeal herein. And in this they pray judgment of the Court.

Respectfully submitted,

THE CITY OF OKLAHOMA CITY,
A Municipal Corporation,
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